

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
FEB 15 2002
U.S. Bankruptcy Court

Geraldine T. Crockett, Clerk
WDNC, Charlotte, NC/sag

In re:) Chapter 13
)
William Anthony Hamilton,)
Phyllis Anne Hamilton)
)
Debtors.) Case No. 01-32854

JUDGEMENT ENTERED ON FEB 15 2002

ORDER DENYING MOTION FOR RELIEF FROM CO-DEBTOR STAY

This matter is before the court on the motion of Bank of Granite for relief from the co-debtor stay pursuant to 11 U.S.C. § 1301. A hearing was held on February 12, 2002. For the reasons stated below, the court has concluded that the motion should be denied.

Jurisdiction

1. Jurisdiction is proper pursuant to 28 U.S.C. §§ 157 and 1334.
2. This matter came before the court after proper notice, and all parties are properly before the court.

Factual Background

3. The male debtor in this case executed a promissory note in favor of the Bank of Granite on February 27, 1998, in exchange for a loan of \$26,526.38 to be repaid in fifty-nine monthly installments at an interest rate of 10.11 percent. The loan was unsecured.

4. The male debtor's former wife, Debbie Hamilton, is a co-debtor on this obligation. The note was guaranteed by Debbie

Hamilton's father, Fred S. Dula, for payment of up to \$10,000.00.

5. The debtors filed a voluntary petition for Chapter 13 bankruptcy protection and a Chapter 13 plan on October 9, 2001.

6. On the date of the debtors' Chapter 13 petition, the payoff on the Bank of Granite note was \$15,851.08, and the October 2001 payment was due.

7. Although the Bank of Granite's claim is unsecured, the debtors' Chapter 13 plan classifies it separately as a priority claim because a co-debtor and a guarantor are involved. The debtors' plan provides that this claim is to be paid in full at ten percent interest--just below the contract rate.

8. Because the promissory note will mature prior to commencement of plan payments, the Bank of Granite petitioned the court for relief from the co-debtor stay so that it could proceed with collection efforts against the co-debtor and the guarantor on the note.

Discussion

9. Section 1301 of the United States Bankruptcy Code stays a creditor of the debtor from collecting from individuals who are liable on a debt along with the debtor. 11 U.S.C. § 1301(a). Imposition of the co-debtor stay protects the debtor from undue pressure from close friends or relatives who, as co-debtors, might induce the debtor to give preference to the co-signed debt. Harris v. Fort Oglethorpe State Bank, 721 F.2d 1052, 1053 (6th

Cir. 1983). Therefore, the co-debtor stay enables the debtor to propose an acceptable plan. Id.

10. Section 1301 does not ignore the creditor's interests, however. The co-debtor stay may be lifted by the court in the event that the creditor shows that the plan filed by the debtor does not provide for payment of the claim, or that the creditor's interests would be irreparably harmed by continuation of the stay. 11 U.S.C. § 1301(c)(2) & (3). Therefore, co-debtor or guarantor liability for the original debt is unchanged by the debtor's bankruptcy filing. In re Binstock, 78 B.R. 994, 996 (Bankr. D.N.D. 1987).

11. Courts that have considered the circumstances that justify lifting the co-debtor stay have focused on the language of § 1301(c) and the legislative history of that provision. See, e.g., Harris, 721 F.2d at 1053. The policy underlying § 1301(c) has been summarized as ensuring that the creditor holding a co-debtor claim does not lose the benefit of its bargain. In re Butler, 242 B.R. 553, 557 (Bankr. S.D. Ga. 1999). Accordingly, the co-debtor stay is to be lifted to the extent that a Chapter 13 plan does not pay any portion of the debt owed to the creditor, or the creditor would suffer irreparable harm. Id.; Harris, 721 F.2d at 1054.

12. While the co-debtor stay does not affect the creditor's substantive rights, it does require the creditor to wait along

with all other creditors for the portion of the debt that the debtor would repay under the plan. Butler, 242 B.R. at 558 (citing H.R. Rep. No. 95-595, at 122 (1977) reprinted in 1978 U.S.C.C.A.N. 5787, 6083). In Harris, as in the case at bar, the creditor alleged that it would be irreparably harmed due to the fact that the debtor's plan would be in operation for a period of years before the creditor received any payment. 721 F.2d at 1054. Nevertheless, the Harris court found that the four-year delay in that case was not sufficient to show irreparable harm. Id. Such a delay, regardless of the inconvenience the creditor may experience, does not constitute irreparable harm. See Butler, 242 B.R. at 559.

13. The creditor here also alleges that it may be harmed because there is no certainty that the co-debtor and the guarantor will remain solvent. Such speculation, absent evidence of insolvency or unavailability of the co-debtor or guarantor, does not justify dissolving the stay. Harris, 721 F.2d at 1054; see also, In re Beveridge, 1994 WL 127579 (Bankr. N.D. Ohio) (holding that the transfer of substantially all of their assets to a living trust by the co-debtors, grandparents of the debtor, did not show that the co-debtors would be unable to make good on the debt should the debtor default on his Chapter 13 plan payments).

14. Indeed, the creditor in this case accepted the risk that each and all of the parties would be unable to meet the terms of the note when the loan was made. And, again, the creditor is scheduled to receive the benefit of its bargain--albeit later than anticipated--upon completion of the debtors' Chapter 13 plan. If, as in Binstock, it was probable that the creditor would not receive material payment on its claim, lifting the co-debtor stay would be appropriate. 78 B.R. at 997. Given that the debtors' plan provides for full payment of the claim at issue, the mere possibility that the co-debtor and guarantor might become unable to pay off the loan does not provide a basis for lifting the stay. Therefore, without a default by the debtors, the creditor is unable to show that it is harmed by the imposition of the debtors' Chapter 13 plan, and the co-debtor stay should remain in effect.

Conclusion

For the above stated reasons, the court declines to lift the co-debtor stay imposed by § 1301.

It is, therefore, ORDERED that the creditor's motion is DENIED.

George R. Hodges
Dated as of date entered.

George R. Hodges
United States Bankruptcy Judge